

1 PACHULSKI STANG ZIEHL & JONES LLP
2 Debra I. Grassgreen (CA Bar No. 169978)
3 Jason H. Rosell (CA Bar No. 269126)
4 One Sansome Street, Suite 3430
5 San Francisco, California 94104
Telephone: (415) 263-7000
Facsimile: (415) 263-7010
E-mail: dgrassgreen@pszjlaw.com
jrosell@pszjlaw.com

6 *Counsel to the Debtor*

7 **UNITED STATES BANKRUPTCY COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**
9 **SAN FRANCISCO DIVISION**

10 In re:

Case No. 23-30662 (HLB)

11 INTERNATIONAL LONGSHORE
12 AND WAREHOUSE UNION,

Chapter 11

13 Debtor.

14
**EX PARTE APPLICATION FOR THE
ENTRY OF AN ORDER PROVIDING
THAT THE AUTOMATIC STAY DOES
NOT APPLY TO A PENDING APPEAL
INVOLVING A PREPETITION
REGULATORY DECISION**

15
16 International Longshore and Warehouse Union (“ILWU” or the “Debtor”), the debtor and
17 debtor in possession in the above-captioned case (the “Chapter 11 Case”), hereby files this *ex parte*
18 application (“Application”) for the entry of an order, pursuant to sections 105 and 362 of Title 11 of
19 the United States Code (the “Bankruptcy Code”), finding that the automatic stay does not apply to an
20 appeal currently pending in the Ninth Circuit Court of Appeals involving a prepetition regulatory
21 decision issued by the National Labor Relations Board (“NLRB”).

22 **JURISDICTION AND VENUE**

23 The United States Bankruptcy Court for the Northern District of California (the “Court”) has
24 jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Order Referring*
25 *Bankruptcy Cases and Proceedings to Bankruptcy Judges*, General Order 24 (N.D. Cal.), and
26 Bankruptcy Local Rule 5011-1(a). This matter is a core proceeding within the meaning of 28 U.S.C.
27 § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

RELEVANT BACKGROUND

A. The Chapter 11 Case

On September 30, 2023 (the “Petition Date”), the Debtor filed a voluntary petition for relief under subchapter V of chapter 11 of the Bankruptcy Code. The Debtor is operating its businesses and managing its properties as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee, committee, or examiner has been made in this Chapter 11 Case.

On October 2, 2023, the United States Trustee appointed Mark Sharf as the subchapter V trustee in this Chapter 11 Case.

B. The NLRB Action and Appeal

On April 6, 2023, the NLRB issued a *Decision and Order* against the Debtor requiring it to (i) cease and desist from taking certain action to require the employer at Terminal 5 in the Port of Seattle to hire members of the Debtor's union rather than members of the International Association of Machinists and Aerospace Workers, District Lodge 160, Local Lodge 289 ("IAM"), and prohibiting the Debtor from pursuing certain lost work opportunity claims and seeking to enforce an arbitration award relating to work performed at Terminal 5 in the Port of Seattle; and (ii) provide certain notices to the Joint Coast Labor Committee and to take other administrative actions. The Decision and Order is attached to the declaration of Eleanor Morton ("Morton Decl.") as Exhibit A filed concurrently herewith. The Decision and Order did not involve the imposition of any monetary judgment or obligation on the Debtor.

On April 10, 2023, the Debtor filed a *Petition for Review* in the Ninth Circuit Court of Appeals commencing the appeal at issue (the “Appeal”). The Appeal is currently pending as part of consolidated cases under Nos. 23-632, 23-658, 23-780, and 23-793.

On October 4, 2023, the Debtor filed a *Notice of Commencement of Bankruptcy Case* in the Ninth Circuit, ***but did not request a stay of the proceedings***. Morton Decl., Ex. B.

On October 9, 2023, IAM, an intervenor in the Appeal and a party to the underlying NLRB proceeding, also filed a *Notice of Filing of Bankruptcy* in the Ninth Circuit, but represented that the

1 “filing of this bankruptcy petition should stay these proceedings.”¹ Morton Decl., Ex. C. IAM did
2 not consult with bankruptcy counsel to the Debtor before filing this pleading.

3 On November 2, 2023, the Ninth Circuit issued an Order staying the Appeal and requiring the
4 Debtor to provide a status report concerning the bankruptcy proceedings and the status of the automatic
5 stay. Morton Decl., Ex. D.

6 The Debtor’s ability to prosecute the Appeal in a timely manner is of critical importance. The
7 imposition of the automatic stay would continue and prolong the loss of work for members of the
8 International Longshore and Warehouse Union bargaining unit at issue, continue the violation and
9 undermining of collectively-bargained commitments by employers, and prolong the uncertainty about
10 provisions of the collective bargaining agreement created by the pendency of the case.

11 **LEGAL AUTHORITY**

12 The stay of the Appeal was incorrectly imposed by the Ninth Circuit as NLRB proceedings,
13 especially those that do not involve any money judgment, fall squarely within the “police and
14 regulatory power” exceptions to the automatic stay. Section 362(b)(4) of the Bankruptcy Code
15 specifically exempts from the automatic stay “the commencement or continuation of an action or
16 proceeding by a governmental unit … to enforce such governmental unit’s or organization’s police
17 and regulatory power, including the enforcement of a judgment other than a money judgment, obtained
18 in an action or proceeding by the governmental unit to enforce such governmental unit’s or
19 organization’s police or regulatory power.” 11 U.S.C. § 362(b)(4).

20 The Ninth Circuit employs two tests to determine whether an action by a governmental agency
21 is exempt from the automatic stay, namely, the pecuniary purpose test (Is the governmental agency
22 pursuing a matter of public safety and welfare rather than a governmental pecuniary interest?) and the
23 public policy test (Is the government action designed to effectuate public policy rather than to
24 adjudicate private rights?). *See, Berg vs. Good Samaritan Hosp., Inc., (In re Berg)*, 230 F.3d 1165
25 (9th Cir. 2000). The Ninth Circuit has exempted NLRB proceedings from the automatic stay under
26 either analysis. *NLRB vs. Cont'l Hagen Corp.*, 932 F.2d 828, 832 (9th Cir. 1991) (NLRB actions are

27
28 ¹ The Debtor reserves all rights, claims, and causes of action against IAM with respect to its postpetition actions in the
Appeal, including its efforts to stay the Appeal.

1 “designed to prevent employers from violating federal labor law,” not to advance the government’s
2 claim to a pecuniary interest; and the NLRB, as Congress’ ‘agent,’ does not provide a forum for
3 disputes among private parties.).

4 Furthermore “[t]here is widespread agreement among the circuits that the National Labor
5 Relations Board and other Congressionally established administrative agencies fall within the category
6 of a governmental unit” and that such proceedings are exempt from the automatic stay. *N.L.R.B. v.*
7 *P*I*E Nationwide, Inc.*, 923 F.2d 506, 512 (7th Cir. 1991) (“it is beyond dispute that the Board is a
8 governmental unit”); *N.L.R.B. v. Edward Cooper Painting, Inc.*, 804 F.2d 934 (6th Cir. 1986);
9 *N.L.R.B. v. Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. 1981) (“it is clear that the N.L.R.B. is a
10 governmental unit”); *In re Bel Air Chateau Hospital, Inc.*, 611 F.2d 1248, 1250-51 (9th Cir. 1979)
11 (N.L.R.B. action is governmental regulatory proceeding); *NLRB vs. 15th Ave. Iron Works, Inc.*, 964
12 F.2d 1336, 1337 (2nd Cir. 1992) (agreeing with the first, fifth, sixth, seventh and ninth circuits that the
13 NLRB is a governmental unit and their proceedings are to enforce their police or regulatory powers);
14 *NLRB vs. Twin Cities Elec.*, 907 F.2d 108, 134 (9th Cir. 1990) (“the filing of a bankruptcy petition
15 does not bar or stay an enforcement proceeding instituted by the National Labor Relations Board.”).

16 Entry of an order confirming that the automatic stay does not apply to the Appeal of the NLRB
17 governmental proceeding is consistent with the intent of the Bankruptcy Code and within the Court’s
18 equitable powers under section 105(a). That section provides that a “court may issue any order,
19 process, or judgment that is necessary or appropriate to carry out the provisions of this title . . . [and
20 nothing shall] preclude the court from, *sua sponte*, taking any action or making any determination
21 necessary or appropriate to enforce or implement court orders or rules, or to prevent abuse of process.”
22 11 U.S.C. § 105(a). At least one bankruptcy court has used its equitable powers under section 105 to
23 issue an order providing that a governmental action is not subject to the automatic stay or post-
24 discharge injunction. *See, In re Fucilo*, 2002 Bankr. LEXIS 475* (January 24, 2002 Bankr. S.D.N.Y)
25 (motion for relief from the post-discharge injunction under 105 was granted where governmental
26 action was exempt from automatic stay).

27 As case law makes clear, the NLRB proceeding, which ultimately resulted in the Debtor’s
28 appeal of the Decision and Order, was exempt from the automatic stay provisions under section

1 362(b)(4) as it represents nothing more than the continuation of a proceeding by a government unit to
2 enforce its police or regulatory powers. Accordingly, the Debtor respectfully requests an order,
3 consistent with Exhibit A attached hereto, approving the Application and providing that the Appeal
4 is not subject to the automatic stay so that it may prosecute the Appeal in a timely manner and protect
5 its member's interests.

6 Dated: November 7, 2023

7 **PACHULSKI STANG ZIEHL & JONES LLP**

8 */s/ Jason H. Rosell*
9 Debra I. Grassgreen
10 Jason H. Rosell
11 *Counsel to the Debtor*

EXHIBIT A

1 PACHULSKI STANG ZIEHL & JONES LLP
2 Debra I. Grassgreen (CA Bar No. 169978)
3 Jason H. Rosell (CA Bar No. 4964185)
4 One Sansome Street, 34th Floor, Suite 3430
5 San Francisco, California 94105-1020
6 Telephone: 415-263-7000
7 Facsimile: 415-263-7010
8 Email: dgrassgreen@pszjlaw.com
jrosell@pszjlaw.com

9
10 *Counsel to the Debtor*

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re

Case No. 23-30662-HB

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION,

Chapter 11

Debtor.

**ORDER GRANTING *EX PARTE*
APPLICATION FOR THE ENTRY OF AN
ORDER PROVIDING THAT THE
AUTOMATIC STAY DOES NOT APPLY TO
A PENDING APPEAL INVOLVING A
PREPETITION REGULATORY DECISION**

Judge: Hon. Hannah L. Blumenstiel

The Court has considered the *ex parte* application of International Longshore and Warehouse Union, the debtor and debtor in possession in the above-captioned case, filed on November 7, 2023 (“Application”), for the entry of an order, pursuant to sections 105 and 362 of Title 11 of the United States Code, finding that the automatic stay does not apply to a consolidated appeal currently pending in the Ninth Circuit Court of Appeals involving a prepetition regulatory decision issued by the National Labor Relations Board, and good cause appearing,

IT IS HEREBY ORDERED THAT:

1. The Application is GRANTED.
2. The automatic stay under 11 U.S.C. § 362 does not apply to the appeal currently pending in the Ninth Circuit Court of Appeals as Case Nos. 23-632, 23-658, 23-780, and 23-793.

29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
5510
5511
5512
5513
5514
5515
5516
5517
5518
5519
5520
5521
5522
5523
5524
5525
5526
5527
5528
5529
55210
55211
55212
55213
55214
55215
55216
55217
55218
55219
55220
55221
55222
55223
55224
55225
55226
55227
55228
55229
55230
55231
55232
55233
55234
55235
55236
55237
55238
55239
55240
55241
55242
55243
55244
55245
55246
55247
55248
55249
55250
55251
55252
55253
55254
55255
55256
55257
55258
55259
55260
55261
55262
55263
55264
55265
55266
55267
55268
55269
55270
55271
55272
55273
55274
55275
55276
55277
55278
55279
55280
55281
55282
55283
55284
55285
55286
55287
55288
55289
55290
55291
55292
55293
55294
55295
55296
55297
55298
55299
552100
552101
552102
552103
552104
552105
552106
552107
552108
552109
552110
552111
552112
552113
552114
552115
552116
552117
552118
552119
552120
552121
552122
552123
552124
552125
552126
552127
552128
552129
552130
552131
552132
552133
552134
552135
552136
552137
552138
552139
552140
552141
552142
552143
552144
552145
552146
552147
552148
552149
552150
552151
552152
552153
552154
552155
552156
552157
552158
552159
552160
552161
552162
552163
552164
552165
552166
552167
552168
552169
552170
552171
552172
552173
552174
552175
552176
552177
552178
552179
552180
552181
552182
552183
552184
552185
552186
552187
552188
552189
552190
552191
552192
552193
552194
552195
552196
552197
552198
552199
552200
552201
552202
552203
552204
552205
552206
552207
552208
552209
552210
552211
552212
552213
552214
552215
552216
552217
552218
552219
552220
552221
552222
552223
552224
552225
552226
552227
552228
552229
5522210
5522211
5522212
5522213
5522214
5522215
5522216
5522217
5522218
5522219
5522220
5522221
5522222
5522223
5522224
5522225
5522226
5522227
5522228
5522229
55222210
55222211
55222212
55222213
55222214
55222215
55222216
55222217
55222218
55222219
55222220
55222221
55222222
55222223
55222224
55222225
55222226
55222227
55222228
55222229
552222210
552222211
552222212
552222213
552222214
552222215
552222216
552222217
552222218
552222219
552222220
552222221
552222222
552222223
552222224
552222225
552222226
552222227
552222228
552222229
5522222210
5522222211
5522222212
5522222213
5522222214
5522222215
5522222216
5522222217
5522222218
5522222219
5522222220
5522222221
5522222222
5522222223
5522222224
5522222225
5522222226
5522222227
5522222228
5522222229
55222222210
55222222211
55222222212
55222222213
55222222214
55222222215
55222222216
55222222217
55222222218
55222222219
55222222220
55222222221
55222222222
55222222223
55222222224
55222222225
55222222226
55222222227
55222222228
55222222229
552222222210
552222222211
552222222212
552222222213
552222222214
552222222215
552222222216
552222222217
552222222218
552222222219
552222222220
552222222221
552222222222
552222222223
552222222224
552222222225
552222222226
552222222227
552222222228
552222222229
5522222222210
5522222222211
5522222222212
5522222222213
5522222222214
5522222222215
5522222222216
5522222222217
5522222222218
5522222222219
5522222222220
5522222222221
5522222222222
5522222222223
5522222222224
5522222222225
5522222222226
5522222222227
5522222222228
5522222222229
55222222222210
55222222222211
55222222222212
55222222222213
55222222222214
55222222222215
55222222222216
55222222222217
55222222222218
55222222222219
55222222222220
55222222222221
55222222222222
55222222222223
55222222222224
55222222222225
55222222222226
55222222222227
55222222222228
55222222222229
552222222222210
552222222222211
552222222222212
552222222222213
552222222222214
552222222222215
552222222222216
552222222222217
552222222222218
552222222222219
552222222222220
552222222222221
552222222222222
552222222222223
552222222222224
552222222222225
552222222222226
552222222222227
552222222222228
552222222222229
5522222222222210
5522222222222211
5522222222222212
5522222222222213
5522222222222214
5522222222222215
5522222222222216
5522222222222217
5522222222222218
5522222222222219
5522222222222220
5522222222222221
5522222222222222
5522222222222223
5522222222222224
5522222222222225
5522222222222226
5522222222222227
5522222222222228
5522222222222229
55222222222222210
55222222222222211
55222222222222212
55222222222222213
55222222222222214
55222222222222215
55222222222222216
55222222222222217
55222222222222218
55222222222222219
55222222222222220
55222222222222221
55222222222222222
55222222222222223
55222222222222224
55222222222222225
55222222222222226
55222222222222227
55222222222222228
55222222222222229
552222222222222210
552222222222222211
552222222222222212
552222222222222213
552222222222222214
552222222222222215
552222222222222216
552222222222222217
552222222222222218
552222222222222219
552222222222222220
552222222222222221
552222222222222222
552222222222222223
552222222222222224
552222222222222225
552222222222222226
552222222222222227
552222222222222228
552222222222222229
5522222222222222210
5522222222222222211
5522222222222222212
5522222222222222213
5522222222222222214
5522222222222222215
5522222222222222216
5522222222222222217
5522222222222222218
5522222222222222219
5522222222222222220
5522222222222222221
5522222222222222222
5522222222222222223
5522222222222222224
5522222222222222225
5522222222222222226
5522222222222222227
5522222222222222228
5522222222222222229
55222222222222222210
55222222222222222211
55222222222222222212
55222222222222222213
55222222222222222214
55222222222222222215
55222222222222222216
55222222222222222217
55222222222222222218
55222222222222222219
55222222222222222220
55222222222222222221
55222222222222222222
55222222222222222223
55222222222222222224
55222222222222222225
55222222222222222226
55222222222222222227
55222222222222222228
55222222222222222229
552222222222222222210
552222222222222222211
552222222222222222212
552222222222222222213
552222222222222222214
552222222222222222215
552222222222222222216
552222222222222222217
552222222222222222218
552222222222222222219
552222222222222222220
552222222222222222221
552222222222222222222
552222222222222222223
552222222222222222224
552222222222222222225
552222222222222222226
552222222222222222227
552222222222222222228
552222222222222222229
5522222222222222222210
5522222222222222222211
5522222222222222222212
5522222222222222222213
5522222222222222222214
5522222222222222222215
5522222222222222222216
5522222222222222222217
5522222222222222222218
5522222222222222222219
5522222222222222222220
5522222222222222222221
5522222222222222222222
5522222222222222222223
5522222222222222222224
5522222222222222222225
5522222222222222222226
5522222222222222222227
5522222222222222222228
5522222222222222222229
55222222222222222222210
55222222222222222222211
55222222222222222222212
55222222222222222222213
55222222222222222222214
55222222222222222222215
55222222222222222222216
55222222222222222222217
55222222222222222222218
55222222222222222222219
55222222222222222222220
55222222222222222222221
55222222222222222222222
55222222222222222222223
55222222222222222222224
55222222222222222222225
55222222222222222222226
55222222222222222222227
55222222222222222222228
55222222222222222222229
552222222222222222222210
552222222222222222222211
552222222222222222222212
552222222222222222222213
552222222222222222222214
552222222222222222222215
5522222